

**DONALD P. ROACH**

*ATTORNEY AT LAW*

3700 Barbur Bldg.

3718 SW Condor, Suite 110

Portland OR 97239

TELEPHONE: (503) 228-7306

FAX: (503) 228-8676

October 13, 2014

Karen V. Gregory  
Office of the Secretary  
Federal Maritime Commission  
800 N Capitol Street NW, Room 1046  
Washington DC 20573  
secretary@fmc.gov

Re: Yakov Kobel and Victor Berkovich Complainants vs.  
Hapag-Lloyd America, Inc. et al  
FMC Docket No. 10-06

Dear Ms. Gregory:

Please find enclosed the original and 15 copies of Complainants' Reply to Respondents' Exceptions to Remand Initial Decision. A copy of Complainants' Reply is being mailed and emailed to respondents this date.

If you have any questions concerning this matter please contact me.

Very truly yours,



Donald P. Roach

DPR/dsh

cc: Clients

Alexander Barvinenko

Wayne Rohde

David K. Monroe

Edward Greenberg

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3  
4 BEFORE THE  
5 FEDERAL MARITIME COMMISSION

6 YAKOV KOBEL and VICTOR BERKOVICH,

Docket No. 10-06

7 Complainants,

8 v.

9 HAPAG-LLOYD AMERICA, INC., LIMCO  
10 LOGISTICS, INC., INTERNATIONAL TLC,  
11 INC.,

12 Respondents.  
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14 COMPLAINANTS' REPLY TO RESPONDENTS' EXCEPTIONS TO  
15 THE REMAND INITIAL DECISION  
16

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17 Submitted by:

18 Donald P. Roach, OSB 75317  
19 Attorney for Complainants  
3718 SW Condor, Suite 110  
Portland OR 97239  
20 FAX: 503-228-8676  
Email: [donroachlaw@yahoo.com](mailto:donroachlaw@yahoo.com)

21 October 13, 2014  
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I.

**INTRODUCTION**

Complainants, by the through their attorney, Donald P. Roach, hereby reply to Respondents exceptions to the Remand Initial Decision dated July 30, 2014. Complainants shall refer to International TLC hereafter as "ITLC" and Respondent Limco Logistics, Inc. hereafter as "Limco".

II.

**FACTUAL AND PROCEDURAL BACKGROUND**

Complainants accept the Commission's Factual and Procedural Background as set forth in the Commission's Remand Decision of July 12, 2013 at pgs 3-10 and as supplemented in the Remand Initial Decision ("RID") at pp 1-3.

Complainants object to Limco's summary of factual background to the extent that it is inconsistent with the Commission Remand and the ALJ's factual background in Remand Initial Decision above and as specifically addressed by Complainants in this reply to its exceptions.

III.

**COMPLAINANTS REPLY TO INTERNATIONAL TLC'S EXCEPTIONS TO THE  
REMAND INITIAL DECISION**

A. ITLC, AS A FREIGHT FORWARDER, VIOLATED SECTION 10(d)(1) OF  
THE SHIPPING ACT BY UNLAWFULLY LIQUIDATING COMPLAINANTS' THREE  
CONTAINERS.

The Commission remanded this case as to ITLC to determine if ITLC, as a freight forwarder, violated Section 10(d)(1) by unlawfully liquidating Complainants three containers and the cargo therein. Kobel v. Hapag-Lloyd et al et al Remand. After the parties filed remand briefs, the ALJ issued a Remand Initial Decision on July 30, 2014. The ALJ found that the evidence supported a finding of a Section 10(d)(1) Shipping Act violation by ITLC.

1 The ALJ stated: "ITLC failed to establish, observe and enforce just and reasonable regulations  
2 and practices in handling the three containers that it improperly liquidated." Kobel v. Hapag-  
3 Lloyd et al, RID p. 2.

4 In arriving at this conclusion, the ALJ found that ITLC performed a number of typical  
5 freight forwarding services with respect to these three containers. The ALJ relied upon the  
6 following facts: ITLC made the shipping arrangements with Limco, an NVOCC, accepted  
7 payments from Complainants for shipping the containers and forwarded these payments to  
8 Limco, suggested Baltic Sea Logistics (BLS) as the agent at the destination port. Kobel v.  
9 Hapag-Lloyd et al RID p. 5.

10 Based upon these facts, the ALJ concluded that the evidence established that ITLC  
11 was an ocean freight forwarding, acting as the agent of a disclosed principal. (Kobel and  
12 Berkovich) Kobel v. Hapag-Lloyd et al RID pp. 5-6. In addition to the above facts, ITLC  
13 president, Mr. Barvinenko testified that ITLC organized the entire shipment (TR 362). (See  
14 also Complainants' Remand Brief pp. 2-3 and Opening Brief pp 28-30 for additional evidence  
15 supporting this conclusion.)

16 In its Exceptions to the Remand Initial Decision, ITLC does not contest the finding  
17 that it acted as an ocean freight forwarder with respect to the shipment of Complainants'  
18 containers.

19 A freight forwarder's breach of its fiduciary duty can be a violation of Section  
20 10(d)(1). Kobel v. Hapag-Lloyd et al et al Remand, p. 50, RID p. 6. The ALJ found:

21 "The evidence does not support a finding the ITLC's actions  
22 including the liquidation, were in Complainants' interest.  
23 Rather, the evidence establishes that ITLC breached its  
24 fiduciary duty to the Complainants." Kobel v. Hapag-Lloyd et  
25 al RID p. 9

26 The ALJ further stated that there is no evidence that ITLC established just or  
reasonable regulations or practices for handling shipments for which it did not receive  
payment or were not picked up timely. Furthermore, ITLC has not identified any legal basis

1 for its liquidation of these three containers. Kobel v. Hapag-Lloyd et al RID p. 9

2 The ALJ concluded that ITLC's liquidation of the damaged container,  
3 MOGU2002520, was unreasonable because Complainants already had paid the freight for this  
4 container. Kobel v. Hapag-Lloyd et al, RID p. 8. The ALJ also found that ITLC failed to  
5 liquidate all three containers in a commercially reasonable manner based upon the facts set  
6 forth in the Remand Initial Decision at p. 8. Those facts include a failure to reasonably  
7 advertise the sale, take an inventory of the goods, conduct a public auction or attempt to  
8 obtain a fair market value for the shipment. ITLC failed to notify Complainants of the date,  
9 location and detail of the liquidation. Kobel v. Hapag-Lloyd et al RID p. 8 (See also  
10 Complainants' Remand Brief pp. 7-8 for additional facts showing commercially unreasonable  
11 sale.)

12 In addition, the ALJ also found that ITLC failed to provide full and accurate  
13 information to the Complainants regarding the details of the liquidation sale and failed to  
14 provide Complainants copies of the revised bills of lading, a violation of 46 C.F.R. Section  
15 515.32(c). This failure to fully advise Complainants of this liquidation and the status of the  
16 containers was not reasonable. Kobel v. Hapag-Lloyd et al, RID p. 9.

17 The Commission questioned whether or not ITLC had any legal right to liquidate  
18 Complainants' containers, such as a carrier's lien or other legal contractual right. Kobel v.  
19 Hapag-Lloyd et al et al Remand, p. 46. The Commission stated:

20 "ITLC" as a freight forwarder could not legally have exercised a  
21 carrier's lien and did not demonstrate any other legal right to  
22 liquidate Complainants' three containers." Kobel v. Hapag-  
Lloyd et al, Remand p. 46.

23 ITLC was a freight forwarder for this shipment and, as such, did not have any carrier's  
24 lien. It never paid storage charges nor had possession of the three containers necessary for a  
25 storage or warehouse lien. Moreover, it did not have any written contract with Complainants  
26 and did not have contractual right to enforce any lien nor did it have Complainants' consent or  
authorization to sell the containers and change the bill of lading. See also Complainants'

1 Remand Brief pp. 1 and 5, Complainants' Reply Brief pp. 2 and 3. (F5, F120, F135; TR348)  
2 ITLC's Exceptions fail to cite or even address any legal right or authority for it to sell  
3 Complainants' containers.

4 ITLC's Exceptions do not specifically controvert the ALJ's finding that the liquidation  
5 sale was not conducted in a commercially unreasonable manner as set forth in Kobel v.  
6 Hapag-Lloyd et al RID pp. 7-9. ITLC cannot justify liquidation of Complainants' three  
7 containers without a legal right, court order or Complainants' authorization. Kobel v. Hapag-  
8 Lloyd et al Remand pp. 47-48. (See also Complainants' Remand Brief pp. 4-5.) Thus,  
9 ITLC's liquidation of Complainants' three containers was unlawful.

10 ITLC contends in its Exceptions to Remand Initial Decision that the ALJ erred in  
11 concluding that ITLC violated Section 10(d)(1) and that Complainants failed to offer  
12 sufficient evidence to present a Shipping Act violation. ITLC's Exceptions, p. 6. However,  
13 as the ALJ found, that ITLC did not establish, observe and enforce just and reasonable  
14 regulations and practices for handling and delivering of Complainants' containers for which  
15 they did not receive payment or that were not picked up timely. Kobel v. Hapag-Lloyd et al,  
16 RID p. 2, 9. The Remand Initial Decision provides sufficient evidence to support these  
17 findings that ITLC acted as a freight forwarder for the shipment of these three containers and  
18 that the liquidation was unlawful and not conducted in a commercially reasonable manner.  
19 The evidence supports a finding that ITLC, as a freight forwarder, breached its fiduciary duty  
20 to Complainants.

21 B. COMMISSION HAS SUBJECT MATTER JURISDICTION.

22 ITLC's Exceptions also challenge the Commission's subject matter of jurisdiction in  
23 this case. ITLC Exceptions p. 3-4. ITLC's argument concerning subject matter jurisdiction is  
24 not relevant to issues raised by the Commission on Remand and was not addressed by the ALJ  
25 in the Remand Initial Decision. Nevertheless, the Commission in its Remand Order held that  
26 the Commission has subject matter jurisdiction under the Shipping Act of 1984 based upon

1 the facts of this case and was not preempted by the Carriage of Goods by Sea Act (COGSA)  
2 Kobel v. Hapag-Lloyd et al Remand pp.11-13, citing Cargo One v. Cosco Container Lines  
3 Company LTD 28 S.R.R. 1635, 1645 (FMC 2000). (See also Complainants' Post Argument  
4 Brief. pp. 15-18.)

5 C. A SINGLE SHIPMENT OR SINGLE TRANSACTION MAY CONSTITUTE A  
6 VIOLATION OF SECTION 10(d)(1) OF THE SHIPPING ACT OF 1984.

7 ITLC also argues that a single violation does not constitute a violation of Section  
8 10(d)(1) because Section 10(d)(1) requires a pattern or multiple violations.

9 The Commission has held that Complainants are not required to prove multiple  
10 violations in order to prove a violation of Section 10(d)(1). The Commission stated in its  
11 Remand Order:

12 "As discussed above, when we consider whether a respondent  
13 "observed[d] and enforce[d]" just and reasonable regulations  
14 and practices, the proper test is not whether the allegation  
15 involves a single shipment or multiple shipments. Rather, the  
16 proper test is whether there was a failure in observing and  
17 enforcing the established just and reasonable regulations and  
18 practices, regardless of whether the question involves a single  
shipment or multiple shipments. A common carrier, MTO or  
OTI can establish just and reasonable regulations and practices  
that are applicable to all their potential customer, but may still  
fail to observe and enforce the established regulations and  
practices with respect to a single shipment, a single transaction,  
or a single shipper." Kobel v. Hapag-Lloyd et al Remand p. 21

19 \* \* \*

20 "A single failure is still a failure and thus a violation of Section  
21 10(d)(1) regardless of whether there was only one failure or  
whether the single failure is part of a sequence of failures or  
multiple failures". Kobel v. Hapag-Lloyd et al, Remand p. 33.

22 Furthermore, the Commission in its Remand Order distinguished the cases cited by  
23 ITLC in its Exceptions to the Remand Initial Decision (pp. 5-6) and for the reasons the  
24 Commission set forth in the Kobel v. Hapag-Lloyd et al Remand pp. 23-25.

25 The Commission has affirmed its holding in Kobel v. Hapag-Lloyd et al, Remand in a  
26 subsequent case, Bimsha International v. Chief Cargo, (FMC Decision Sept. 4, 2013).

1 The Commission in Bimsha supra at p. 11 stated:

2 “However, the Commission has indeed recognized that  
3 NVOCCs violate Section 10(d)(1) when they fail to fulfill  
4 NVOCC obligations, through a single or multiple actions or  
5 mistakes, and therefore engage in unjust and unreasonable  
6 practice.” See Kobel v. Hapag-Lloyd et al et al, Bimsha  
7 International v. Chief Cargo, supra p. 11 (FMC Decision Sept.  
8 4, 2013).

9 The majority in opinion Bimsha, supra and Kobel v. Hapag-Lloyd et al did not adopt  
10 the arguments made by ITLC and the dissent in both Kobel v. Hapag-Lloyd et al, Remand and  
11 also Bimsha v. Chief Cargo (FMC Decision, Sept. 4, 2013)

12 In summary, ITLC has not raised any new arguments in its exceptions to Remand  
13 Initial Decision not previously presented when the Commission issued its Remand Order on  
14 July 12, 2013. ITLC’s Exceptions should be denied.

#### 15 IV.

### 16 COMPLAINANTS’ REPLY TO LIMCO’S EXCEPTIONS TO THE REMAND

#### 17 INITIAL DECISION

18 The Commission remanded this case as to Limco for possible Section 10(d)(1)  
19 violations as follows:

20 “ . . . For further adjudication whether Limco failed to  
21 establish, observe and enforce just and reasonable regulations  
22 and practices by issuing changed bills of lading and facilitating  
23 ITLC’s liquidation of Complainants’ three containers; and, if it  
24 is found that Limco violated section 10(d)(1) by such action,  
25 whether the violation caused injury to Complainants.” Kobel v.  
26 Hapag-Lloyd et al Remand p. 51

27 The relevant issues were (1) whether Limco established just and reasonable  
28 regulations and practices with respect to the changing of bills of lading and (2) whether Limco  
29 failed to observe and enforce just and reasonable regulations and practices by issuing changed  
30 bills of lading with respect to Complainants’s three containers, thus facilitating the liquidation  
31 of the containers. Kobel v. Hapag-Lloyd et al Remand p. 43. The ALJ concluded that  
32 “Limco either did not establish or did not observe and enforce just and reasonable regulations

1 and practices relating to or connected with the receiving, handling, storage or delivering  
2 property in this situation.” Kobel v. Hapag-Lloyd et al, RID p. 14. Limco agreed to transport  
3 Complainants’ cargo to Complainants in Poland but failed to deliver the three liquidated  
4 containers to Complainants. Its failure to fulfill its obligations as an NVOCC constitutes a  
5 violation of Section 10(d)(1). Kobel v. Hapag-Lloyd et al, RID p. 14., Houben v. World  
6 Moving Service, Inc., 31 S.R.R. 1400, 1405 (FMC 2010)

7 A. LIMCO EITHER FAILED TO ESTABLISH OR DID NOT OBSERVE AND  
8 ENFORCE JUST AND REASONABLE REGULATIONS AND PRACTICES RELATED  
9 TO COMPLAINANTS’ THREE LIQUIDATED CONTAINERS IN THIS CASE

10 Limco contends in its exceptions and to the Remand Initial Decision, that it’s conduct  
11 changing bills of lading was consistent with its clearly established just and reasonable  
12 practices of following a freight forwarder’s instruction when changing the bills of lading and  
13 therefore it cannot constitute a violation of Section 10(d)(1). Limco Exceptions to Remand  
14 Initial Decision, Sections III and IV. However, Limco misconstrues the Remand Initial  
15 Decision.

16 The ALJ found that Limco generally established just and reasonable practices of  
17 changing bills of lading at the request of a freight forwarder. However, Limco was not  
18 entitled to rely solely on the freight forwarder’s (ITLC) instruction based on the facts in the  
19 instant case. Limco knew or had reason to know that the freight forwarder was acting  
20 contrary to the principal’s interests. Kobel v. Hapag-Lloyd et al, RID p. 14.

21 The ALJ specifically stated as follows:

22 “Limco established the just and reasonable practice of changing  
23 bills of lading at the request of the freight forwarder. However,  
24 Limco was not entitled to rely solely on the freight forwarders  
25 request under these facts, because Limco knew or had reason to  
26 know that the freight forwarder was acting contrary to the  
principal’s interests. Accordingly, the evidence shows that  
Limco either did not establish or did not observe and enforce  
just and reasonable regulations and practices relating to or  
connected with receiving, handling, storing or delivering  
property in this situation.” Kobel v. Hapag-Lloyd et al, RID p.



1 14. (emphasis added)

2 Although ITLC was acting as a freight forwarder the ALJ found that ITLC was acting  
3 contrary to the interest of its principal by liquidating the three containers. Kobel v. Hapag-  
4 Lloyd et al, RID p. 14. The ALJ stated:

5 “This raised the issue of whether ITLC retained the implicit  
6 authority to act for the Complainants after improper  
liquidation.” Kobel v. Hapag-Lloyd et al, RID p. 11

7 Limco had no right to rely upon instructions of ITLC when Limco knew or had reason  
8 to know that ITLC was acting adversely to the Complainants’ interest by liquidating the  
9 containers for its own benefit. Kobel v. Hapag-Lloyd et al, RID p. 11. (See Restatement  
10 (Third) of Agency Section 5.04 and Restatement (Second) of Agency Section 135).

11 A third party who deals with a principal through an agent, knowing or having reason  
12 to know that the agent acts adversely to the principal, does not deal in good faith.  
13 Restatement (Third) of Agency Section 5.04. Apparent authority is not present when a  
14 reasonable person would not believe that the principal consents to the agent’s conduct. If a  
15 third party has notice or facts that call into question the agent’s authority, these facts would  
16 prompt a reasonable person to make inquiry of the principal before dealing with the agent, the  
17 agent does not have apparent authority. Restatement (Third) of Agency Section 3.11  
18 Comment (e), Restatement (Second) of Agency Section 135. Kobel v. Hapag-Lloyd et al RID  
19 p. 11.

20 Mere creation of an agency for some purposes does not automatically invest the agent  
21 with apparent authority to bind the principal without limit. Highland Capital Management v.  
22 Schneider, 607 F.3d 322, 328 (2<sup>nd</sup> Cir., 2010), Cert. denied 131 S. Ct. 1045. A party cannot  
23 claim that the agent acted with apparent authority to bind the principal when it knew or should  
24 have known the agent was exceeding the scope of his authority. Highland Capital  
25 Management supra p. 328. A person who is placed on inquiry as to an agent’s authority and  
26 has reasonable means to make inquiry is charged with actual knowledge and facts which an



1 inquiry would have discovered. Racicky v. Farmland Industries, Inc. 328 F.3d 389 (8<sup>th</sup> Cir.,  
2 2003)

3 Based upon the above Restatement (Third) of Agency §5.04 and §3.11 (Comment (e))  
4 ITLC's authority had terminated when Limco knew or should have known ITLC had  
5 liquidated Complainants' containers. Limco cannot claim that ITLC had either apparent or  
6 implied authority, when it knew or should have known that ITLC was acting adversely to the  
7 principal's interest by liquidating Complainants' containers and then instructed Limco to  
8 change the shipper and the consignee on the bills of lading.

9 The specific facts of this case are much different than the typical situation described in  
10 Limco's Exceptions where the NVOCC has no reason or knowledge that the freight forwarder  
11 is acting without actual or apparent authority of the shipper. As discussed in more detail in  
12 Section IV B below, the facts in this case placed Limco on notice that ITLC was acting  
13 adversely to its principal and therefore had a duty to make inquiry of the Complainants as to  
14 the freight forwarder's (ITLC) authority, especially when Limco had reasonable means to  
15 make such inquiry. Limco should be charged with the actual knowledge of facts which such  
16 an inquiry would have discovered. Racicky v. Farmland Industries, Inc. 328 F.3d 389 (8<sup>th</sup> Cir.  
17 2003). Limco knew, or should have known, that Complainants did not consent to the  
18 liquidation of the three containers. Complainants did not give Limco or ITLC authority or  
19 consent to change the bills of lading of the shipper and consignee to a third party (F120).  
20 Furthermore, Limco failed to inquire as to whether the liquidation sale was proper or lawful.

21 The ALJ stated that Limco knew or should have known that ITLC's liquidation of the  
22 three containers was improper. Complainants agree that the facts support this finding for the  
23 reasons set forth below in Section IV B. Nevertheless, the fact that ITLC was liquidating  
24 these containers to recover ITLC's shipping costs and without any consent or authorization  
25 from Complainants was sufficient evidence to terminate ITLC's apparent authority and Limco  
26 should not have proceeded to change the bills of lading without reasonable inquiry of

1 Complainants.

2        Whatever agency relationship that may have existed when the damaged container  
3 initially was shipped, there was no agency relationship with respect to the damaged container  
4 at the time of the liquidation as Complainants and Limco had direct dealings with respect to  
5 the damaged container from May, 2008 to at least December, 2008 when the containers  
6 arrived in Poland. Therefore Limco had no reason to rely upon ITLC's instructions on March  
7 2, 2009 to change the shipper and consignee of the bills of lading of that container to a third  
8 party.

9        In its Exception to the Remand Initial Decision, Limco contends that if it was  
10 complying with established just and reasonable regulation and practices to follow instructions  
11 from the freight forwarder it cannot violate Section 10(d)(1) for failing to observe established  
12 just and reasonable regulations and practices. However, this presupposes that the agent has  
13 the actual or apparent authority to act for the Complainants in the first instance. The  
14 reasonableness of Limco's established practice of following the freight forwarder's instruction  
15 is predicated upon the freight forwarder having authority, if any, to bind the shipper. ITLC  
16 did not have apparent authority to change the bills of lading and to bind its principal. Limco  
17 knew that ITLC did not have written consent or authorization from Complainants and knew or  
18 should have known that ITLC was acting for its own benefit and not Complainants when it  
19 liquidated the three containers but failed to make reasonable inquiry.

20        Limco advocates, in essence, for immunity from violation of Section 10(d)(1) under  
21 any circumstances if it follows any requests to change a bill of lading from a freight forwarder.  
22 However, it would not be a just and reasonable practice to follow a freight forwarder's request  
23 to change a bill of lading if the NVOCC knows or has reason to know that the freight  
24 forwarder did not have actual or apparent authority for the principal.

25        In this case, for the reasons discussed below in Section IV B, ITLC notified Limco of  
26 the liquidation sale of Complainants's three containers in January, 2009. Limco knew that

1 ITLC was liquidating these containers to recover some of its shipping costs. Limco and ITLC  
2 admit that they had almost daily conversations for an extended period from at least January,  
3 2009 to March 2, 2009 regarding these containers and recovering these costs and moving the  
4 containers. However, during this time there was no evidence that there was ever any inquiry  
5 made of ITLC or Complainants regarding approval or consent to this liquidation sale by  
6 Complainants and change of the bills of lading to a third party.

7 This situation and the interaction between the NVOCC and a freight forwarder in this  
8 case is much different than the typical situation for a freight forwarder described by Limco in  
9 its Exceptions. There can be no just and reasonable practice that permits an NVOCC to  
10 change a bill of lading knowing that the freight forwarder does not have actual or apparent  
11 authority from the principal and is acting adverse to the principal's interest.

12 Furthermore, an NVOCC cannot be observing and enforcing just an reasonable  
13 regulations and practices if it changes the shipper and consignee on the bills of lading unless a  
14 freight forwarder has authority from the shipper.

15 Limco contends that the practice of following the forwarder's instructions is just and  
16 reasonable and sound policy. Limco argues that it is impractical for a carrier to contact the  
17 shipper to confirm every instruction received by a freight forwarder to determine if the agent is  
18 acting within the scope of his authority. (Limco Exceptions pp. 10-12) Complainants do not  
19 suggest that a carrier must make inquiry in every case. However, a carrier cannot follow the  
20 instructions of a forwarder as a matter of course especially when a carrier has knowledge that  
21 a freight forwarder is acting adversely to the principal's interest as in this case.

22 It would not be sound policy for the carrier to disregard the facts and knowledge such  
23 as Limco had through its repeated personal contact with the shipper regarding the damaged  
24 container and also with ITLC with notice and its numerous conversations about liquidation for  
25 recovery of the forwarders costs to the detriment of the Complainants. Sound policy indicates  
26 that the Commission should weigh, not only the efficient handling and transportation of cargo,

1 but also the protection of the public and the consumer shipper from unfair and deceptive  
2 practices.

3 B. THE EVIDENCE SUPPORTS A FINDING THAT LIMCO KNEW OR  
4 SHOULD HAVE KNOWN THAT ITLC WAS LIQUIDATING COMPLAINANTS' THREE  
5 CONTAINERS AND SUCH LIQUIDATION WAS IMPROPER.

6 Limco contends that the ALJ's conclusion that Limco knew or should have known that  
7 ITLC was acting contrary to Complainants' interest is based upon speculation unsupported by,  
8 and inconsistent with, the evidence. Limco Exceptions to Remand Initial Decision, pp. 2, 12.  
9 Limco contends that it did not even know that ITLC had liquidated the three containers when  
10 ITLC instructed Limco to change the bills of lading. Limco Exceptions pp. 2, 3.

11 Contrary to Limco's assertions, there is more than sufficient and unrefuted evidence  
12 that Limco knew that ITLC had liquidated Complainants' three containers when ITLC  
13 instructed Limco to change the bills of lading. Direct evidence from the testimony of both Mr.  
14 Lyamport of Limco and Mr. Barvinenko of ITLC prove that Limco knew that ITLC liquidated  
15 the containers.

16 First, ITLC's president, Mr. Barvinenko unequivocally testified at the hearing that he  
17 notified Limco of the sale and Limco knew the containers would be sold to pay for ITLC's  
18 alleged shipping costs. (TR 387-389, Complainants's Ex 79.)

19 Second, Lyamport admitted in his deposition that he had numerous discussions about  
20 these containers almost everyday. He received a copy of the notice of the unpaid balance from  
21 ITLC to Complainants (Ex 79) sometime in January, 2009. TR 741, Complainants' Exhibit  
22 78 at p. 33, Kobel v. Hapag-Lloyd et al RID pp. 12-13. This notice from ITLC to  
23 Complainants stated that two containers, MOGU20101987 and MOGU20051660, would be  
24 utilized if payment was not made within five days. Complainants Ex. 79.

25 Third, both Limco's president Michael Lyamport and Mr. Barvinenko of ITLC  
26 admitted that they had almost daily discussions about the containers prior to the liquidation

1 sale and instruction from ITLC to change the bills of lading. TR 736, TR 742-744. When  
2 asked about the discussions regarding the liquidation sale, Lyamport testified:

3 “Mr. Lyamport, when asked at the hearing about discussions  
4 regarding the liquidation sale, testified that:

5 You said when we were discussing the liquidation sale. We - we - we  
6 had the discussion with International TLC to get our payment - to get  
7 paid and get the containers picked up. This was - this was our main  
8 concern, to get the containers picked up from the port so that we have  
9 no further liabilities with Hapag-Lloyd. TR 747" (Emphasis added)

10 When Lyamport was asked whether he had any discussions with ITLC prior to  
11 changing the bills of lading he stated:

12 “Well, we had numerous discussions about these, all these  
13 containers. And it was, yes, a big discussion every - almost  
14 every day at this time because I was, as I said earlier, we were  
15 pressured by Hapag-Lloyd to resolve this case. And basically,  
16 International TLC had made - had made a move to find out 0  
17 find a way to resolve the situation and provide us with  
18 instructions, new instructions how to change the name of the  
19 shipper, the consignee, in order to get the cargo moving out of  
20 the port.” [TR 744] Kobel v. Hapag-Lloyd et al RID p. 12-13.

21 Mr. Barvinenko testified:

22 “I notified them (Limco) and also asked them if they have  
23 somebody over there who would be interested just to conduct a  
24 preliminary research.” TR 387. (Emphasis added)

25 Fourth, ITLC emailed a packing list for one of the liquidated containers,  
26 MOGU2101987, to Lyamport on February 2, 2009 (EX 84). When asked at deposition about  
the timing of this email, Mr. Lyamport stated that is when ITLC started negotiating to have  
these containers moved out of port and preparing documents. Complainants’ EX 78, p. 31.

Fifth, Lyamport testified at the deposition that Limco had heard that ITLC was trying  
to liquidate the damaged container and sell it to a third party to collect their money.  
Complainants’ Ex 78 at p. 19; RID 13.

Sixth, Limco knew that the Complainants were the shipper and the principal party in  
interest with respect to the three containers. (Complainants’ EX 5, 16, 22, 84, 97 p. 1). Limco

1 received the packing list for the three containers from Complainants and knew that the stated  
2 value for the cargo in the containers was a combined sum of over \$120,000. Limco knew or  
3 should have known that liquidation to pay ITLC's shipping costs would result in a dramatic  
4 financial loss to Complainants.

5 Finally, neither Lyamport nor Barvinenko in their testimony ever denied that Limco  
6 knew that ITLC had liquidated the three containers when ITLC requested that Limco change  
7 the shipper and consignee on the bills of lading.

8 The ALJ found that there was no evidence that Complainants were willing to sell their  
9 containers. Limco knew that ITLC was planning to liquidate the containers to recover ITLC's  
10 shipping cost. Limco never inquired of ITLC or Complainants about the requested change of  
11 both the shipper and consignee on the bills of lading. Kobel v. Hapag-Lloyd et al RID p. 14.

12 The ALJ in the Remand Initial Decision refers to additional evidence to support the  
13 findings that Limco knew or should have known that ITLC had liquidated Complainants'  
14 containers when ITLC requested the change in the bill of lading. Kobel v. Hapag-Lloyd et al  
15 RID pp. 11-14.

16 Furthermore, the ALJ also found that Limco knew or should have known that the  
17 liquidation was improper. The ALJ stated:

18 "Limco also knew or should have known that ITLC was a  
19 freight forwarder with a fiduciary duty to Complainants and  
20 without legal authority to liquidate the containers. Therefore,  
21 the evidence indicates that although Limco did not direct or  
participate in the liquidation, that Limco knew or should have  
known of the improper liquidation." Kobel v. Hapag-Lloyd et al  
RID p. 14.

22 As stated above, Limco knew or should have known that ITLC was liquidating the  
23 three containers without Complainants's consent and for the purpose of recovering some of its  
24 shipping costs. Limco knew that ITLC was acting adversely to Complainants' interests and  
25 would result in a substantial loss to Complainants of their investment in the containers and  
26 cargo. Therefore, Limco knew that ITLC's sale was a breach of its fiduciary duty to

1 | Complainants and improper.

2 |         Furthermore, Limco also knew that ITLC was not a carrier and could not enforce a  
3 | carrier's lien. Limco knew that ITLC did not have possession of the containers and cargo  
4 | which were in Poland and could not have a storage or warehouse lien.

5 |         ITLC did not have any written contract with Complainants (F5) and therefore did not  
6 | have any contractual security interest or lien to enforce. Limco knew or should have known  
7 | that there was no contractual right because of its dealings with ITLC on a daily basis  
8 | concerning these containers receiving ITLC's notice of liquidation January, 2009 until the  
9 | request to change the bills of lading on March 2, 2009.

10 |         Because Limco knew ITLC was acting adversely to the Complainants' interests, Limco  
11 | should have inquired of ITLC or the Complainants, especially knowing that Complainants did  
12 | not consent to such sale, as to any legal authority or contractual right or lien rights of ITLC to  
13 | sell Complainants' containers. There was no testimony at trial or in depositions from either  
14 | Barvinenko of ITLC or Lyamport of Limco that ITLC had any enforceable contract rights or  
15 | lien right to liquidate Complainants' containers.

16 |         Moreover, Limco received a notice of liquidation from ITLC, dated January 9, 2009  
17 | (Complainants' EX 79) and therefore knew or should have known of the deficiencies with  
18 | respect to the notice and also the manner of the improper liquidation sale. In particular, the  
19 | damaged container was omitted from this notice and therefore Complainants never received  
20 | any notice of liquidation as to the damaged container. Limco knew or should have known  
21 | there could be no valid or legal liquidation without proper notice to Complainants.

22 |         Finally, because of the almost daily contact and discussions between Lyamport and  
23 | Barvinenko concerning these containers and making a move to "resolve the situation" and for  
24 | ITLC to get paid, Limco should have known that ITLC was acting in its own interest and not  
25 | on the interest of its principal and in violation of its fiduciary duty.

26 |         It is appropriate to draw inferences from certain facts when direct evidence is not



1 available and circumstantial evidence may be sufficient, however it cannot be drawn from  
2 mere speculation. Waterman Steamship v. General Foundaries, Inc. 26 S.R.R. 1170, 1180  
3 (1993) adopted in relevant part 26 S.R.R. 1424 (1994). In this case, not only the direct  
4 evidence from the testimony of the parties, but also the circumstantial evidence surrounding  
5 the circumstances leading up to ITLC's request to change the bills of lading support the ALJ's  
6 finding that Limco changing these three bills of lading when it knew or had reason to know  
7 that the change requested was due to an improper liquidation. Thus, Limco violated Section  
8 10(d)(1).

9 Furthermore, Limco had agreed to transport Complainants' three liquidated containers  
10 to Poland. An NVOCC's failure to fulfill its obligation constitutes a violation of Section  
11 10(d)(1). Houben v. World Moving Service, Inc. 331 S.R.R. 1400, 1405 FMC 2010.  
12 Limco now argues that it did not know that ITLC had liquidated the three containers at the  
13 time ITLC requested the change to the bills of lading. Limco Exceptions, p. 3, 12. The  
14 testimony of Barvinenko and Lyamport and the reasonable inferences drawn therefrom as well  
15 as other circumstantial evidence discussed above prove that Limco knew or should have  
16 known of the liquidation.

17 Limco now offers only speculation and argument that ITLC was now selling the  
18 containers on behalf of Complainants or a third party and that Limco could expect ITLC to  
19 have an enforceable lien right. (Limco Exceptions p. 13, footnote 9) However, Limco does not  
20 refer to any facts in the record to support such inference or conclusion.

21 Limco argues that Hapag-Lloyd and Limco were considering options to curtail  
22 mounting demurrage charges. However, the evidence in the record disputes this assertion.  
23 Limco argues that it was pressured by Hapag-Lloyd for freight and other related charges such  
24 as demurrage (TR 742-744). However, the Hapag Lloyd agent in Poland, Ms. Ossowska,  
25 testified that these three containers in Gdynia, Poland were at the terminal and that Baltic Sea  
26 Logistics was responsible for storage charges when they were released to Baltic Sea in



1 November, 2008. (Ossowska Tr. 654-655) The containers had already been released to the  
2 destination agent appointed by ITLC, Baltic Sea Logistics (BSL) (Ossowska Tr. 654).  
3 Lyamport also testified in deposition that he was not obligated for any storage charges and did  
4 not pay any storage charges. (Complainants' Ex 78 p. 12)

5 The parties that benefitted from this liquidation were ITLC and perhaps Baltic Sea  
6 Logistics. Limco had no reason to rely upon ITLC's instructions when it knew that ITLC was  
7 liquidating the containers without the consent of Complainants and at a great financial loss to  
8 Complainants solely to benefit ITLC. Considering the testimony of Lyamport and  
9 Barvinenko, both Limco and ITLC were more concerned about recovering payment of  
10 shipping fees and moving the containers than whether or not ITLC had a lawful right to  
11 liquidate these containers or whether the liquidation was performed in a commercially legal  
12 manner. (TR 387, 744, 747)

13 Likewise, Limco's contention that ITLC could have had an enforceable lien against the  
14 cargo is based purely on speculation and not on evidence in the case. Arguments regarding  
15 expectations by Limco based upon "alleged typical" NVOCC contractual lien rights in a  
16 freight forwarder's agreement with shipper should be disregarded as outside the record and not  
17 based on any facts received in evidence. Limco's Exceptions p. 15, footnote 12. ITLC did not  
18 have any lien rights nor any other legal rights to sell these containers. ITLC has not presented  
19 any facts to support an inference of any legal rights to sell the containers at any stage in the  
20 proceedings. Moreover, Lyamport never testified that it was changing the bills of lading based  
21 upon any expectation that ITLC had any enforceable lien rights. The record is devoid of any  
22 evidence of any legal right, contractual right or otherwise, to justify the liquidation.

23 As stated above in Section IV A, Limco, knowing that ITLC was acting adversely to  
24 the principals' interest had a duty to make reasonable inquiry of Complainants or ITLC as to  
25 its authority to change the bills of lading.

26 Limco should have made reasonable inquiry as to (1) Complainants' consent or

1 authorization, and (2) if no consent or authorization, of ITLC's legal authority to liquidate the  
2 containers before changes to the bills of lading. A reasonable inquiry in this case would have  
3 shown that Complainants did not consent or authorize the sale or changing of the bills of  
4 lading and that ITLC did not have any legal authority to sell the containers.

5 Limco failed to meet its obligation as an NVOCC, to fulfill its obligations to deliver  
6 the containers to Complainants. Limco has thus violated Section 10(d)(1) by failing to fulfill  
7 the obligations of an NVOCC. Houben v. World Moving Service, Inc. 31 S.R.R. 1400, 1405  
8 (FMC 2010).

9 C. A SINGLE SHIPMENT OR SINGLE TRANSACTION MAY CONSTITUTE  
10 A VIOLATION OF SECTION 10(d)(1) OF THE SHIPPING ACT OF 1984

11 Limco's Exceptions at p. 16-18 also challenges the Commission's holding in Kobel v.  
12 Hapag-Lloyd et al Remand that a single shipment or transaction may constitute a violation of  
13 Section 10(d)(1). Kobel v. Hapag-Lloyd et al Remand p. 21, 33.

14 Limco's Exceptions are very similar to the exceptions raised by ITLC with respect to  
15 this issue. (See ITLC Exceptions p. 4-7.) The Commission in Kobel v. Hapag-Lloyd et al  
16 Remand p. 21 held that:

17 " . . . The proper test is not whether the allegation involves a  
18 single shipment or multiple shipments. Rather, the proper test is  
19 whether there is a failure in observing and enforcing the  
20 established just and reasonable regulations and practices  
21 regardless of whether the question involves a single shipment or  
22 multiple shipments."

23 Limco's exception with respect to this issue should be denied for the same reasons as  
24 ITLC's exception for the reasons set forth in Section III (C) of this reply.

25 Moreover, Limco raises other arguments that were mentioned in the dissent in Kobel  
26 v. Hapag-Lloyd et al Remand pp. 58-60, 94. Limco contends that the holding in Kobel v.  
Hapag-Lloyd et al Remand that Section 10(d)(1) imposes a strict liability standard on carriers.  
This argument was likewise raised by the dissent in Kobel v. Hapag-Lloyd et al Remand pp.

1 58, 60, 94 but not followed by the majority of the Commission.

2 A violation of Section 10(d)(1) does not impose strict liability or make a carrier or a  
3 guarantor as suggested by Limco in its Exceptions, p. 17. A complainant must prove either a  
4 failure to establish just and reasonable regulations and practices or prove a failure to observe  
5 and enforce just and reasonable regulations and practices in each case. This is not the same as  
6 imposing strict liability for any injuries that arise in a shipment.

7 Furthermore, a complainant must prove that even if there is a violation of Section  
8 10(d)(1) that such violation caused injury to the complainant. As found by the Commission in  
9 the instant case, Hapag-Lloyd violated Section 10(d)(1) with respect to the damaged container  
10 but Complainants' claim was dismissed as to Hapag-Lloyd because they failed to prove that  
11 the violation caused injury to Complainants. (See Kobel v. Hapag-Lloyd et al Remand p. 34-  
12 37.)

13 Limco further suggests that Section 10(d)(1) should apply only to either a pattern of  
14 conduct or to intentional malpractice rather than to a single isolated act. This argument was  
15 again addressed but not adopted by the Commission in Kobel v. Hapag-Lloyd et al Remand p.  
16 21-22.

17 The Commission held that the language of Section 10(d)(1) does not state that only an  
18 intentional or willful failure would constitute a violation. Kobel v. Hapag-Lloyd et al Remand  
19 p. 21-22. The fact that this case could be resolved and treated as a contractual dispute in a  
20 commercial forum does not preclude the Commission from considering disputes which also  
21 involve a violation of the Shipping Act and specifically Section 10(d)(1). Kobel v. Hapag-  
22 Lloyd et al Remand pp. 12-13, citing Cargo One, Inc. v. Cosco Container Lines Company,  
23 LTD, 28 S.R.R. 1635, 1645.

24 D. LIMCO'S VIOLATION OF SECTION 10(d)(1) CAUSED INJURY TO  
25 COMPLAINANTS

26 The Remand Initial Decision found that Complainants' losses were the direct result of

1 the improper liquidation of the containers. Kobel v. Hapag-Lloyd et al RID p. 15.  
2 Complainants sustained a loss of \$126,072 as a consequence of the violations of ITLC and  
3 Limco Logistics. Both ITLC and Limco were found to be jointly and severally liable for  
4 damages. Kobel v. Hapag-Lloyd et al RID p. 18. (See Complainants' Remand Brief at p. 14  
5 for further argument on causation.)

6 E. RESPONDENTS ARE NOT ENTITLED TO A CREDIT OR OFFSET FOR  
7 DEMURRAGE OR STORAGE CHARGES NEVER PAID.

8 Limco contends that the Remand Initial Decision improperly calculated reparations by  
9 failing to deduct demurrage charges incurred prior to liquidation for the three containers.  
10 (Limco Exceptions to RID p. 18-19.) Limco argues that it is indirectly being charged the  
11 demurrage charge incurred by Complainants.

12 Neither Limco nor ITLC should be granted any credit for demurrage charges which  
13 they did not actually pay. The record shows that neither ITLC or Limco paid any storage  
14 charges for these containers. Furthermore, Mr. Lyamport testified at deposition that Limco  
15 was not obligated to pay Baltic Sea Logistics. (Complainants' EX 78, p. 12-13) Complainants  
16 actually paid \$3,100 to Baltic Sea Logistics, albeit late (Complainants EX 128).

17 The standard as set forth by the ALJ in the Remand Initial Decision is in accordance  
18 with the controlling cases before the Commission for determining damages. (See Kobel v.  
19 Hapag-Lloyd et al RID p. 15-17.)

20 Limco's Exceptions claim storage charges for the three containers was \$15,000. (p.  
21 19, footnote 16) Limco's cites F123 which refers to the testimony of Remishevsky at trial  
22 where he testified that Alex Szhuk paid \$15 - 1,600. (TR 328, 329) At deposition,  
23 Remishevsky testified that Szhuk told him he paid \$12,000 to \$14,000 but that Barvinenko  
24 told him that he estimated the storage charges of \$15,000. (TR 308)

25 However, the more definitive evidence is the actual invoice from Baltic Sea Logistics.  
26 Victor Berkovich emailed Baltic Sea Logistics requesting invoices for the three containers on

1 or about February 6, 2009. (F115) Baltic Sea Logistic emailed the invoices to Mr. Berkovich  
2 on February 16, 2009 stating that the total storage charges for all three containers was \$7,300  
3 with the following breakdown: MOGU2002520 - \$1,100; MOGU2101987 - \$3,100 and  
4 MOGU20051660 - \$3,100 (Complainants' EX 104, EX 105). Thus, the actual storage charge  
5 owed to Baltic Sea Logistics was \$7,300 rather than \$15,000. Neither Limco nor ITLC paid  
6 these charges.

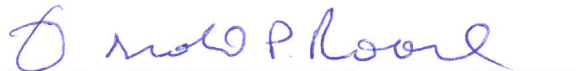
7 V.

8 **CONCLUSION**

9 Based upon the foregoing reasons, Respondents' Exceptions should be denied and the  
10 Remand Initial Decision dated July 30, 2014 should be affirmed.

11 Respectfully submitted:

12 Dated this 13 day of October, 2014.

13  
14 

15 Donald P. Roach, OSB 75317

16 Attorney for Complainants

17 FAX: 503-228-8676

18 Email: donroachlaw@yahoo.com  
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## CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct:

1. I am over the age of eighteen years and I am not a party to this action.
2. On October 13, 2014, I served a complete copy of **COMPLAINANTS' REPLY TO RESPONDENTS' EXCEPTIONS TO REMAND INITIAL DECISION**

to the following parties at the following addresses, by the following method:

  X   First class mail, postage prepaid

  X   electronic mail (email)

David K. Monroe  
Edward Greenberg  
GKG Law, PC  
Canal Square, Suite 200  
1054 Thirty-First St., NW  
Washington DC 20007  
[egreenberg@gkglaw.com](mailto:egreenberg@gkglaw.com)  
[dmonroe@gkglaw.com](mailto:dmonroe@gkglaw.com)

Alexander Barvinenko  
International TLC, Inc.  
500 Valley Ave., NE  
Puyallup WA 98372  
[info@itlclogistics.com](mailto:info@itlclogistics.com)  
[alnea@itlclogistics.com](mailto:alnea@itlclogistics.com)

Wayne R. Rohde, Esq.  
Hapag-Lloyd  
Cozen O'Connor  
1627 I St., NW, Suite 1100  
Washington DC 20006  
[wrohde@cozen.com](mailto:wrohde@cozen.com)

DATED: October 13, 2014.

By: Donald P. Roach  
Donald P. Roach, Esq.  
3718 SW Condor, Suite 110  
Portland OR 97239  
Email: [donroachlaw@yahoo.com](mailto:donroachlaw@yahoo.com)  
Attorney for Complainants